Supreme Court, U.S.
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No. 98-1950

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALAN D. BOLINGER, JR.,
Petitioner

v.

THOMAS RIDGE, *et al.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law enforcement officer who is terminated from his position without a hearing, based on the filing of criminal charges against him and in accordance with state civil service requirements, but who is subsequently afforded his rights through the grievance process provided for under a collective bargaining agreement, may recover additional damages for violation of his due process rights - in the nature of back-pay, compensatory damages, and attorney fees - in a civil rights action brought pursuant to 42 U.S.C. §§1983 & 1988?

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STATEMENT OF THE CASE

This case presents the question of whether a state law enforcement officer who is terminated from his position without a hearing, but who is subsequently afforded his rights through the grievance process provided for under a collective bargaining agreement, may recover additional damages for violation of his due process rights - in the nature of back-pay, compensatory damages, and attorney fees - in a civil rights action brought pursuant to 42 U.S.C. §§1983 & 1988.

1. Petitioner is a Capitol Police Officer employed by the Department of General Services ("DGS"), an agency of the Commonwealth of Pennsylvania. Pet. App. at 2a. Respondents are Gary E. Crowell, Secretary of DGS; and John R. McCarty, Deputy Secretary for Administration of DGS.[1] *Id.* at 2a-3a. Petitioner was suspended from his position as a Capitol Police Officer without pay on September 6, 1995 after being arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. *Id.* at 3a. Eight days later, on September 14, 1994, petitioner filed a grievance of his suspension as provided for under the governing collective bargaining agreement. *Id.* at 10a. Petitioner's grievance was denied by Respondent McCarty on September 29, 1995. *Id.*

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[1] Thomas J. Ridge, Governor; Gregory C. Santoro, Chief Counsel for DGS; Gregory A. Green, Director of the Bureau of Personnel for DGS; Thomas G. Paese, Secretary of Administration of the Commonwealth; and Paul A. Tufano, General Counsel of the Commonwealth were originally named as defendants in this case. However, all claims against these individuals were dismissed by order of the district court on November 14, 1997 due to their lack of personal involvement in the matters alleged in the complaint. Pet. App. at 21a-31a. Petitioner did not appeal this decision. *Id.* at 4a.

Petitioner did not raise any issues regarding the propriety of his suspension in his appeal to the Court of Appeals. *Id.* at 4a.

Petitioner was subsequently terminated from his position effective October 16, 1995. *Id.* at 3a. Under existing state civil service rules, DGS was permitted to suspend petitioner for only thirty days, after which time it was required to either return him to active duty or terminate his employment. *Id.* at 3a n.1. Given these alternatives, respondents believed that they had no choice but to terminate his employment since the criminal charges against petitioner were still pending at that time. Although a hearing would have ordinarily been held prior to terminating the employment of a Capitol Police Officer, no hearing was held in this case since the suspension and termination were based on petitioner's arrest and the filing of criminal charges against him, a fact to which there appeared to be no real dispute. *Id.* at 14a-15a.

On October 27, 1995, petitioner filed a grievance of his termination as provided for under the terms of the collective bargaining agreement. *Id.* at 3a. This grievance was denied by Respondent McCarty on November 7, 1995. *Id.* at 10a. Subsequently, on May 21, 1996, the Bureau of Labor Relations for the Commonwealth of Pennsylvania denied petitioner's appeals from the denial of the grievances filed in connection with his suspension and termination. *Id.* On August 6, 1996, Respondent McCarty, under the direction of Respondent Crowell, confirmed petitioner's termination. *Id.* at 11a. On October 21, 1996, petitioner requested a grievance arbitration hearing as provided by the collective bargaining agreement. *Id.* On February 25, 1997, prior to the conclusion of the arbitration hearing in this matter, DGS entered a settlement agreement with petitioner in which he was reinstated to his position and given back-pay from the disposition date of the criminal charges

against him.[2] *Id.* at 3a. There is nothing in the record (and petitioner has at no time alleged otherwise) which would indicate that petitioner could not have obtained full compensation for his lost wages and benefits under the terms of the collective bargaining agreement if he had chosen to pursue the arbitration process to its conclusion instead of entering the settlement agreement.

2. Six months after entering the settlement agreement, petitioner commenced the present federal civil rights action alleging that his right to substantive and procedural due process under the United States and Pennsylvania Constitutions was violated when he was suspended and subsequently terminated from his position with the Capitol Police, without pay and without being afforded a pre-disciplinary hearing. Pet. App. at 3a-4a. On November 14, 1997, the district court dismissed all claims raised in the complaint except those relating to respondents' decision to terminate petitioner's employment. The parties subsequently agreed to a joint stipulation of facts and filed cross-motions for summary judgment. *Id.*

On March 2, 1998, the district court granted respondents' motion for summary judgment on all remaining claims. *Id.* at 4a. In reaching its decision, the district court analyzed the particular facts of this case in the context of the *Matthews v. Eldridge*, 424 U.S. 319 (1976) balancing test and held that petitioner's due process rights were not violated. The district court concluded, *inter alia*, that respondents acted

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[2] On or about July 18, 1996, the charge of disorderly conduct was reduced, and Bolinger pled guilty to one charge of summary harassment in the Lancaster Court of Common Pleas. All other criminal charges pending against petitioner were *nolle prossed*. Pet. App. at 3a.

properly and that a pre-termination hearing was not required under the specific facts of this case since the value of holding such a hearing while criminal charges were still pending against petitioner was limited, the government interest in removing petitioner from his position as a law enforcement officer was substantial given the threat to public confidence were he returned to active duty while criminal charges were pending against him, and the probability of permanent and irreparable harm to petitioner was minimal due to the existence of the grievance arbitration procedure under the collective bargaining agreement. Pet. App. at 12a-17a.

3. In the Court of Appeals, petitioner, relying on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), argued that terminating him from his position without a hearing violated his right to procedural due process under the Fourteenth Amendment. Respondents made three arguments in opposition to this claim. First, they argued that the existence of an adequate grievance arbitration procedure provided petitioner with sufficient procedural protections for purposes of the due process clause under the Fourteenth Amendment. Second, respondents, relying on the Supreme Court's recent decision in *Gilbert v. Homar*, 520 U.S. 924 (1997) and traditional principles of due process, maintained that a pre-termination hearing was not required since: (a) the value of holding a hearing while the criminal charges were still pending was negligible; and (b) the chance that petitioner would suffer a permanent and erroneous deprivation of his employment were slight given the significant opportunities available to him with which to challenge the termination decision under the collective bargaining agreement. Third, respondents argued that even if they had committed a technical violation of petitioner's rights by not holding a hearing, they were entitled to qualified immunity.

The Court of Appeals, in an unpublished opinion, rejected petitioner's argument and affirmed the decision of the district court, concluding that the "governmental interest in terminating [petitioner] outweighed any deprivation that he may have suffered." Pet. App. at 4a. In reaching its decision, the Court of Appeals relied heavily on this Court's recent decision in *Homar*, its own prior decision in *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996), and traditional principles of due process as enunciated in *Matthews*. Pet. App. at 4a-5a. The Court of Appeals determined that under the unique facts of this case, petitioner's due process rights were not violated since: (1) "the government had a very strong interest in removing [petitioner] from active duty as a Capitol police officer until the criminal charges against him were resolved;" (2) petitioner's "interest in a pre-disciplinary hearing . . . was considerably weaker given that he had access to, and availed himself of, the grievance and arbitration procedures that eventually lead to his reinstatement;" (3) the risk of error was low since respondents terminated petitioner only "after confirming that he had been arrested and charged with criminal conduct;" and (4) the value of additional procedural safeguards was low given Pennsylvania's thirty day limitation on suspensions and the dilemma faced by respondents whereby they either had to reinstate petitioner to his position or terminate him. Pet. App. at 5a.

REASONS FOR DENYING THE WRIT

The Court Of Appeals Applied Well Settled Law About Which There Is No Circuit Conflict.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), this Court held that a police officer who was arrested and criminally charged for drug related offenses was not entitled to notice and a hearing prior to being suspended without pay. The Court found that where an employee holds a position of "great public trust and high public visibility, such as police officers," the government has a significant interest in suspending the officer without pay and without the benefit of a prior hearing. *Id.* at 932. In reaching this decision, the Court specifically repudiated the view suggested in dicta by *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), that pre-deprivation process is always required in the employment context. Rather, the Court reaffirmed its position that due process is a flexible concept which requires different procedural safeguards depending on the particular situation involved. *Homar*, 520 U.S. at 930-31.

In the present case, the Court of Appeals applied the Court's reasoning in *Homar* to find that petitioner's right to due process was not violated where he was suspended and then terminated from his position as a Capitol Police Officer after being arrested and criminally charged with disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. Pet. App. at 4a-5a. The Court of Appeals' decision was based on the unique set of facts presented by this case, was unreported, and has no precedential value. Furthermore, although petitioner attempts to create a conflict among the circuits, no such conflict exists.

Petitioner argues that the Court of Appeals' decision conflicts with its own prior decision in *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) (pre-deprivation hearing afforded police officers sufficient notice and an opportunity to be heard for purposes of due process under *Loudermill*), as well as the Fifth Circuit's decision in *Schaper v. City of Huntsville*, 813 F.2d 709, *rehearing denied*, 818 F.2d 865 (5th Cir. 1987) (pre-termination hearing not rendered invalid by biased decision-maker for purposes of due process so long as state provides adequate post-deprivation remedy), the Seventh Circuit's decision in *Chaney v. Suburban Bus Division of the Regional Transportation Authority*, 52 F.3d 623, 628 (7th Cir. 1995) (terminated bus driver would be entitled to prevail on claim that he was denied due process absent showing that employer actually provided pre-termination notice or that Union agreed to "forego additional pre-termination procedures in favor of the collective bargaining agreement's grievance and arbitration procedure"), and the Eleventh Circuit's decision in *Harrison v. Wille*, 132 F.3d 679 (11th Cir. 1998) (sheriff deputy's right to due process was not violated where he chose to exercise Fifth Amendment right instead of presenting evidence at pre-disciplinary conference). However, with the exception of *Harrison*, all these cases were decided prior to this Court's decision in *Homar*. Accordingly, to the extent that these decisions conflict with *Homar*, they are implicitly overruled and should not be viewed as creating a conflict between the circuits.[3]

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[3] *Harrison*, the only case cited to by petitioner which was decided after *Homar*, involved the question of whether a deputy sheriff's right to due process was violated where he chose to exercise his Fifth Amendment right against self-incrimination instead of presenting evidence at a predisciplinary conference. While the case did involve the termination of a law enforcement officer, any factual

Moreover, the cases cited to by petitioner are factually distinguishable from the present case and, even disregarding the intervening decision in *Homar*, their holdings would not create an actual conflict with the decision reached by the Court of Appeals in this case. The Court of Appeals relied on the following case specific facts in reaching its decision in the present case: (1) petitioner was a police officer who held a position of high public trust and high visibility; (2) the reason underlying the suspension and termination were the filing of criminal charges itself and not the merit of those charges; (3) petitioner's termination was not really permanent since he could, and in fact did, obtain reinstatement through the grievance and arbitration procedures under the collective bargaining agreement; (4) petitioner's termination did not really affect his status since he was already suspended without pay at the time of his termination; and (5) the value of holding a pre-deprivation hearing when the criminal charges were still pending was minimal where respondents were required to either terminate or reinstate petitioner after thirty days under Pennsylvania's civil service rules. Pet. App. at 4a-5a. Although *Gniotek*, *Schaper*, and *Harrison* all involved due process claims raised by terminated law enforcement officers, none of these cases involved the same factual or legal issues as in the present case.

Petitioner is critical of the Court of Appeals' reliance on the fact that he could obtain reinstatement with back pay pursuant to the grievance and arbitration procedures under the

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similarity with the present case ends there. Moreover, the decision simply did not address the question of whether petitioner's right to due process was violated by respondent's failure to provide him with a pre-termination hearing under the unusual circumstances presented by this case.

collective bargaining agreement in reaching its decision. Nevertheless, he does not cite to a single case which holds that this is not a legitimate factor to be considered under *Matthews v. Eldridge* and traditional principles of due process. Conversely, those courts which have considered the issue have found that the existence of post-deprivation grievance procedures is a factor to be considered in evaluating an employee's claim that he or she was denied due process and under certain circumstances may preclude such a claim. *See, e.g., Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996); *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); *Naramanchi v. Bd. of Trustees of Conn. State Univ.*, 850 F.2d 70 (2d Cir. 1988); *Lewis v. Hillsborough Transit Auth.*, 726 F.2d 664 (11th Cir. 1983) (*per curiam*), *cert. denied*, 469 U.S. 822 (1984); *Ash v. Bd. of Educ. of Woodhaven School Dist.*, 699 F.2d 822 (6th Cir. 1983).

In the present case, the Court of Appeals applied the *Matthews* balancing test to weigh the competing interests of petitioner and his employer, and determined that the requirements of due process had been met under the specific facts of this case. Pet. App. at 4a-5a. In reaching this decision, the Court of Appeals relied heavily on this Court's recent decision in *Homar*. Pet. App. at 4a-5a. Although petitioner disagrees with this result has simply failed to show that the decision by the Court of Appeals in this case conflicts with the holdings of this Court in *Matthews* and *Homar,* or any of the circuit court decisions he cites.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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